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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No. _____

PATRICK MARK DeMASI,
RANDALL THOMAS MEHLOW, and
RICHARD CHARLES ELLINGTON,

PETITIONERS,

-vs-

PEOPLE OF THE STATE OF CALIFORNIA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the removal of marijuana from a police department evidence locker, which marijuana was seized in an unrelated case, and which removal constitutes an apparent violation of state law and later delivery and sale of this marijuana by an undercover officer to the defendants and their subsequent arrest for possession of that marijuana constitute a denial of basic due process under the Fifth and Fourteenth Amendments to the United States Constitution such as to justify dismissal of charges against the defendants?

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OPINION BELOW

Following entry of guilty pleas in the Superior Court of the State of California, the conviction of the three petitioners was reversed by the California Court of Appeal, Fourth Appellate District, Division One, in an opinion issued on December 24, 1981. The State of California's request for rehearing was granted and on May 24, 1982, the Court of Appeal, Fourth Appellate District, Division One, filed an opinion affirming the judgment of conviction with a dissenting opinion (Exhibit "A"). On June 8, 1982, factual modifications in the opinion were made (Exhibit "B"). On August 4, 1982, the Supreme Court of the State of California en banc denied petitioners' request for a hearing with Justice Broussard voting in favor of granting a hearing. (Exhibit "C").

JURISDICTION

The jurisdiction of this Court is invoked under Title 28 U.S.C. Section 1257(3).

RELATED PARTIES AND CASES

By way of information filed by the District Attorney of San Diego County on May 25, 1979, petitioners Patrick Mark DeMasi, Randall Thomas Mehlow and Richard Charles Ellington were charged with various narcotics violations in violation of California state law. Following denial of various motions filed on behalf of defendants, guilty pleas to possession of marijuana for sale were entered by petitioners DeMasi and Mehlow (California Health and Safety Code Section 11359). Petitioner Ellington pled guilty to possession of a controlled substance (California Health and Safety Code Section 11357(a)).

In a two to one decision by the Court of Appeal on December 24, 1981, the convic-

tions were reversed. Following the granting of a rehearing, the Court of Appeal affirmed the convictions in a two to one decision filed on May 24, 1982. With one justice dissenting, the California Supreme Court denied their petition for hearing.

STATEMENT OF THE CASE

In late February of 1979, Officer Donald Berstler of the National City Police Department, on assignment to the San Diego County Narcotics Task Force, contacted petitioner Patrick DeMasi. He had been given information from another source that he could purchase cocaine from DeMasi. Berstler's initial contacts with both DeMasi and petitioner Mehlow to purchase cocaine were unsuccessful. On March 13, 1979, DeMasi stated he would not or could not supply any cocaine. Petitioner Mehlow told Berstler in one telephone conversation he was planning on leaving the state and suggested Berstler

not call him anymore regarding the purchase of narcotics. Berstler stated he contacted DeMasi and/or Mehlow six to ten times to request the purchase of controlled substances.

On March 13, 1979, Berstler again requested DeMasi obtain cocaine for him. DeMasi told Berstler he was unable to do so but asked Berstler if he (Berstler) could provide him and others with pound quantities of marijuana. Berstler told DeMasi it might be able to be done and said it would cost approximately four hundred twenty-five dollars ($425.00) per pound. DeMasi expressed an interest in purchasing approximately seven to ten pounds of marijuana. Berstler then stated the price for an amount that large would be four hundred twenty dollars ($420.00) per pound. Berstler also stated they must provide him with some cocaine or they would obtain no marijuana. The informant who had introduced Berstler to

petitioner DeMasi stated Berstler could obtain all the marijuana they wanted.

Between the time of this conversation and petitioners' arrest the following day, Agent Berstler removed from the National City Police Department evidence locker one pound of marijuana which was to be destroyed and had been seized in another unrelated case. On March 14, 1979, the three petitioners met Berstler at a shopping center in San Diego County. Petitioners DeMasi and Mehlow were in the front seat of the vehicle and petitioner Ellington in the rear. Discussion between Mehlow and Berstler took place after which a small sample (.9 grams) of cocaine was given to Berstler. The money for purchasing the marijuana was shown and the marijuana given to petitioners. In Berstler's presence, a sample of the marijuana was examined and smoked. Petitioner Mehlow gave Berstler four hundred

twenty dollars ($420.00) for the one pound sample. The petitioners were then arrested.

ARGUMENT

THE AGENT'S REMOVAL OF MARIJUANA FROM THE POLICE EVIDENCE LOCKER IN VIOLATION OF STATE LAW, SALE TO THE DEFENDANTS, AND ENCOURAGEMENT OF ITS USE, CONSTITUTES A VIOLATION OF PETITIONERS' DUE PROCESS RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A. The Investigating Officer's Conduct was in Clear Violation of California State Law.

A reading of California Health and Safety Code Sections 11474 and 11474.5 evidences an intent that controlled substances seized by law enforcement officers not be used in a manner similar to that employed by the agent in the present case. The language of this section is quite clear and mandates:

> "All seizures under provisions of this chapter. . . shall, upon conviction of the owner or defendant, be ordered

> destroyed by the judge of the court in which the conviction was had and the judge shall turn all such evidence over to the Attorney General for destruction or disposition."[1] (Emphasis added.)

Section 11486 provides for similar disposition when the case has been disposed of by way of dismissal or otherwise than by way of conviction. This language is unambiguous and has been interpreted as mandatory by the California Supreme Court. People v. Backus, 23 Cal.App.3d 360, 384-385.

It is difficult to imagine a more blatant violation of the above sections than for the officer to remove the contraband from an evidence locker, place it in the possession of the defendants, and actually dispose of a portion of it by encouraging those same defendants to smoke a portion of that contraband provided. The actions

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[1] Section 11474 has been renumbered and is now embodied in Section 11473.5.

of the officer were clearly unauthorized.

B. The Conduct of the Agent in the Present Case was Outrageous to the Extent that Due Process Principles Bar the Government from Invoking Judicial Process to Obtain a Conviction.

The idea of excessive or outrageous police conduct as forming a bar to prosecution on due process grounds has been recognized by this Court in United States v. Russell, 411 U.S. 423, 431-432 [93 S.Ct. 1637]. In Russell, the decision in Sherman v. United States, 356 U.S. 369 [78 S.Ct. 819] was affirmed wherein excessive police conduct was viewed as equally offensive as coerced confessions and unlawful searches.

Since 1971, the Ninth Circuit Court of Appeals has recognized a defense based on outrageous law enforcement conduct which continues to be applicable. See United States v. Prairie, 572 F.2d 1316, 1319,

note 3 (9th Cir. 1978); Greene v. United States, 454 F.2d 785 (9th Cir. 1971). In Prairie, supra, it was noted that due process principles could still bar a criminal conviction where the government's conduct was sufficiently offensive.

The question here presented is whether the agent's conduct in removal of the marijuana from the evidence locker and encouragement of the defendants to consume a portion thereof, all in apparent violation of existing California state law, constitutes conduct so outrageous that due process principles should bar prosecution. Petitioners urge the question raised creates defects in the very institution of the prosecution. The majority of cases discussed in the opinions of the courts to this date have not involved the degree of police misconduct involved here. This conduct violates fundamental fairness and is ". . .[s]hocking to the

universal sense of justice, mandated by the Due Process Clause of the Fifth Amendment." United States v. Russell, supra, 411 U.S. 423, 431-432. In Russell, supra, the conduct of the undercover federal narcotics agent involved limited participation in a methamphetamine laboratory already in operation. In Hampton v. United States, supra, 425 U.S. 484, the government agent instigated the sale and supplied the contraband which the defendant then turned and sold to other undercover agents. The plurality opinion in Hampton held that even though the police involvement exceeded that in Russell, it was not a denial of due process because Hampton showed a pre-disposition to sell the contraband and, in fact, did engage in an independent act of sale to the second group of agents.

Police conduct which constitutes outrageous involvement for purposes of invoking

due process objections has generally been held in the federal courts to be one of degree. In evaluating whether government conduct is outrageous, the Court must consider the nature of the crime and the tools available to law enforcement agencies to combat it. United States v. Twigg, 588 F.2d 373, fn. 6 (3rd Cir. 1978).

An examination of the totality of circumstances in the present case, leads to the conclusion the investigating officer actually manufactured and created the charged offense. He was continually rebuffed in his attempts to induce two of the petitioners to sell him cocaine. He violated the law of California by taking the contraband to sell to the defendants, and he not only did in fact supply the marijuana but stood by while they smoked it. He no sooner put it in their hands when they were arrested for possession of that same marijuana for

sale.

This differs substantially from those federal cases in which the government supplies the contraband to a defendant who later, of his own volition, engages in a separate independent criminal act of selling the contraband to another government agent. In the present situation, no intervening free act took place -- the crime was completed upon delivery of the contraband to the defendants. As Chief Justice Warren observed in Sherman v. United States, supra, 356 U.S. 369, the function of law enforcement ". . . does not include the manufacturing of crime."

CONCLUSION

For the reasons stated herein, Petitioners DeMasi, Mehlow and Ellington respectfully request this Court grant the Writ

prayed for.

DATED: 27 September 1967

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CERTIFIED FOR PUBLICATION

COURT OF APPEAL

FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. PATRICK MARK DEMASI, et al., Defendant and Appellant.	)	FILED May 24, 1982 4 Crim. No. 11661 (Super. Ct. No. CR 46830)

APPEAL from a judgment of the Superior Court of San Diego County, Norbert Ehrenfreund, Judge. Affirmed.

Linda R. Navarro, Scott R. Barnett and Patrick J. Hennessey, Jr., for Defendants and Appellants.

George Deukmejian, Attorney General, Robert H. Philibosian, Chief Assistant

EXHIBIT "A"

Attorney General, Daniel J. Kremer, Assistant Attorney General, Harley D. Mayfield and Jay M. Bloom, Deputy Attorneys General, for Plaintiff and Respondent.

Defendants Patrick Mark DeMasi, Randall Thomas Mehlow, and Richard Charles Ellington appeal judgments of conviction entered after each pleaded guilty to narcotics charges stemming from purchase and sale transactions involving undercover officers of the National City Police Department. The crux of defendants' argument is that the procedures employed by police here amount to gross and outrageous misconduct which violates their due process rights and entitles them to dismissal of the charges.

Although we conclude that the due process issue framed by defendants is not cognizable on appeal after a plea of guilty, it would appear that defendants were misled

into believing that appellate review of their claim was proper. We therefore treat this as a case of an improperly induced guilty plea. (See People v. DeVaughn (1977) 18 Cal.3d 889.) Nonetheless, even were defendants to have received the appellate review they bargained for, we have concluded they would not be entitled to relief since there was no police misconduct in this case warranting dismissal of the charges. We therefore affirm the judgments.

I

The issues in this case center around the activities of Donald A. Berstler, a narcotics officer for the National City Police Department, who was the sole witness at the preliminary hearing. He testified to the following facts.

On February 21, 1979, Berstler received information from a confidential informant

that DeMasi, Mehlow and Ellington were trafficking cocaine in San Diego. Shortly thereafter, Berstler was introduced to DeMasi by the confidential informant. DeMasi in turn introduced Berstler to Mehlow and Ellington.

After the introduction, Berstler began an attempt to induce the three defendants to sell him a quantity of cocaine. Although Berstler's initial contacts with both DeMasi and Mehlow were unsuccessful,[1] he testified that DeMasi instructed him "to keep getting back to him in order to purchase the cocaine."

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[1] Berstler had only two conversations with Mehlow. During the second, Mehlow informed Berstler that he did not have any cocaine for sale, that he was leaving California, and asked that Berstler "not call him in the future for additional negotiations." Thereafter, Berstler restricted his inquiries to DeMasi, who had instructed Berstler to "keep getting back to him. . . ."

After a series of between six and ten phone calls over a period of approximately 18 days, DeMasi told Berstler on March 13 that his cocaine contact had been arrested, making the consumation of a cocaine deal unlikely. DeMasi then asked if Berstler could supply pound quantities of Columbian marijuana. Berstler said he could, and arrangements as to price ($420 per pound), quantity (10 pounds) and time and place of the purchase were made.

The following day DeMasi telephoned Berstler and offered to sell him a sample quantity of cocaine. The sale of cocaine was scheduled for the same time and place as the previously planned marijuana purchase. That afternoon at approximately 1:00 p.m., Berstler met DeMasi as agreed in the parking lot of a shopping center in National City. DeMasi was sitting in an automobile with defendants Mehlow and Ellington. Berstler

approached and asked if they brought the cocaine. Both Mehlow and DeMasi replied in the affirmative. After a "show" of funds sufficient to purchase 10 pounds of marijuana, Berstler paid Mehlow $125, received the cocaine sample and went back to his own vehicle to get the marijuana.

When Berstler returned he handed a bag containing one pound of marijuana to Mehlow, who opened the bag and removed several buds and stems.[2] Ellington asked to see the marijuana and was passed some buds. He squeezed the buds, inspected them and handed them back to Mehlow. DeMasi then took some buds, placed them in a pipe, lit the pipe and passed the pipe around. Mehlow and DeMasi joined in smoking the contraband and commented on the "good"

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[2] Berstler related that the one pound bag of marijuana sold to defendants was obtained from the National City Police Department's store of evidence awaiting destruction.

quality of the marijuana. Mehlow paid Berstler $420 for the one pound bag and requested scales to weigh the remaining nine pounds which Berstler had in his vehicle. Berstler then gave a prearranged signal to fellow officers and defendants were arrested for possession for sale of the one pound just bought. In Berstler's opinion, defendants were purchasing the marijuana for sale.

All three defendants were charged with conspiracy to possess marijuana under Penal Code section 182.1 (count one) and possession of marijuana for sale under Health and Safety Code section 11359 (count two). DeMasi and Mehlow were also charged with sale of a controlled substance under Health and Safety Code section 11352 (count three).

After the preliminary hearing, defendants noticed a motion, purportedly pursuant

to Penal Code sections 995 and 1538.5,[3] based on the allegedly outrageous misconduct of Officer Berstler which defendants contended entitled them to a dismissal of the charges on due process grounds. The motion was heard by Judge Norbert Ehrenfreund sitting in the law and motion department of the San Diego Superior Court. Judge

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[3] One of defendants' counsel admitted in his argument on the motion that the due process claim did not properly fit within a section 1538.5 rubric: "I think, basically, your honor, that my motion is not directed toward the suppression of evidence but geared towards a basic violation of due process in that [the police officer's] actions are of sufficient nature -- it's not really in the nature of a 1538.5 or even a non-statutory motion to suppress. My motion on these facts is of a request for a dismissal on mere due process grounds due to the impropriety of his conduct. It's not really in the nature of a 1538.5. I'm asking for an outright dismissal by this court. I think that Backus and Barraza and some of the other cases cited in our points and authorities would seem to support that when the police engage in this type of conduct or illegal conduct, that the court does have the authority under basic due process grounds to dismiss the case against the defendants."

Ehrenfreund indicated to defendants that he believed their due process claim was most properly characterized as a non-statutory motion to dismiss[4] which should be

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[4] Despite defense counsel's lack of familiarity with the procedural basis of defendants' due process claim, Judge Ehrenfreund scrupulously dissected the options available in explaining his ruling. "As I see this, you're making this attack conceivably on four different grounds: 995, 1538.5, entrapment, and, finally, the nonstatutory motion to dismiss."

Turning first to the section 995 motion, Judge Ehrenfreund warned counsel, "You appreciate, of course, that the 995 motion must be based solely on the evidence received at the preliminary hearing?" The judge continued, "You can only dismiss under 995 on two basic grounds. One is, is the evidence sufficient? The other one is whether there was a violation of -- whether there was an irregularity iin the procedure, in the commitment. Those are the two basic grounds, of course, for 995. But I don't quite see how this motion could come under 995. Basically we always consider 995 as a sufficiency of the evidence motion. That's my problem."

Reviewing defendants' section 1538.5 approach (see also ante, fn. 3), the judge concluded, "I don't find any section under 1538.5 that applies here. It's not a search and seizure motion. I can't -- it doesn't come under any aspect of 1538.5, as I see it. I just don't think 1538.5 applies." (cont.)

brought before the assigned trial judge --

where additional evidence could be presented

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[4] (cont.)
Judge Ehrenfreund then stated, "With regard to any possible entrapment issue,. . . I don't know of any law that permits me to rule on entrapment at the time of this proceeding or any authority for me to rule on entrapment at this stage of the proceeding. That is a trial issue. It must await the ruling of the trial court. I think it would be improper for me to rule on it at this time. [¶] Now we come to the nonstatutory motion to dismiss, which I think is the core of this motion, the nonstatutory motion to dismiss on the ground of serious police misconduct, which is violative of the defendants' due process rights. . . . I'm frankly disturbed by the fact that Officer Berstler permitted them in his presence to consume [the drug], to ingest it. . . . [¶] But the question, Gentlemen, is whether that authorizes me -- no matter how disturbed I may be about that, am I under any rule or law authorized to dismiss the case because I'm disturbed about the officer's judgment? I think Officer Berstler used poor judgment in doing that, but that does not authorize this court to dismiss a case against the defendants because of Officer Berstler's poor judgment or because he may have violated one of the code sections with regard to the use of marijuana which is in the possession of the police. At any rate, I do not feel it's proper. [¶] I know one might say, 'Well, the judge is reluctant to bite the bullet' or 'the judge (cont.)

-- rather than in the law and motion department. (See post, fn. 5) Defendant's motion was then denied without prejudice.

Rather than renewing their motion before the trial judge, defendants elected to enter into a plea bargain before Judge Ehrenfreund. DeMasi and Mehlow pleaded guilty to one count of simple possession of marijuana, a lesser included offense of the conspiracy charge. The change of plea forms signed by defendants Mehlow and Ellington specified that they could appeal

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4 (cont.)
is shrinking from his decision' but that's not the case here. If it were my decision to make, I would make it. But I don't think it's proper for me to make the decision with regard to whether or not the case should be dismissed because of serious police misconduct. That's not my decision to make. That has to be made at the trial court level. . . . [¶] I've said enough about it. I've already said to some degree what I feel about it, but whether it requires a dismissal or not, I think it has to be left to the trial judge to decide. And for those reasons the motion is denied at this time, your nonstatutory motion is denied without prejudice."

the due process issue. All three defendants were granted three years' probation.

II

Having declined to follow Judge Ehrenfreund's suggestion that they renew the motion in the trial court where additional evidence would have been presented, defendants' position on appeal is premised on their contention that the preliminary hearing transcript establishes as a matter of law a pattern of police misconduct so gross and outrageous as to require a dismissal of the charges on due process grounds. Accordingly, they argue that the motion was properly brought under a Penal Code section 995 rubric and that Judge Ehrenfrend erred in declining to rule on it.[5]

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[5] Cases discussing the propriety and scope of a section 995 motion in situations such as this have generally focused on the statute's requirement that the defendant has "been legally committed by a magistrate." (cont.)

The People suggest we dispose of the case on the threshold question of the cognizability of defendants' claims after their

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5 (cont.)
(See, e.g., Jennings v. Superior Court (1967) 66 Cal.2d 867, 874; People v. Wright (1969) 2 Cal.App.3d 732, 735.) The court in Wright stated that "where evidentiary inquiry during the course of a preliminary examination establishes that the defendant has been deprived of a substantial right, the commitment is unlawful and the deprivation may be asserted through a motion to set aside the information under section 995." (2 Cal.App.3d at p. 735; italics in original.)

Subsequent Court of Appeal opinions, however, have taken issue with Wright's broad language, especially in situations where the defendant's "deprivation" to any extent involves an issue collateral to his guilt or innocence. Thus in People v. Sahagun (1979) 89 Cal.App.3d 1, the defendant's claim involved a question of prejudicial prosecutorial delay. The court stated, "A section 995 motion is not intended to result in an evidentiary hearing; the court's consideration is generally restricted to the evidence contained in the preliminary hearing transcript. . ." and noted that "unless the issue were deliberately tried at the preliminary hearing, it would be unlikely that the People would have introduced into evidence all the evidence they might have. . . ." (Id., at p. 21, fn. 10.) And in People v. Crudginton (1979) 88 Cal.App.3d 295, the court specifically (cont.)

guilty pleas. While recognizing the constitutional nature of defendant's argument,

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5 (cont.)
identified entrapment as one of these collateral issues which could rarely, if ever, be proved using only the preliminary hearing transcript. (Id., at p. 301, fn. 5.) Even if it could, however, the court indicated that "the nonstatutory motion procedure would still appear to be more appropriate, for it would afford both parties an opportunity to present additional evidence relevant to the issue. If neither party desired to present additional evidence, they could, of course, agree to submit the motion on the basis of the evidence relevant to the issue contained in the transcript of the preliminary hearing." (Id., at p. 300.)

To summarize, a section 995 motion is an inappropriate vehicle to use in raising a collateral issue challenge unless the deprivation of some substantial right of defendant's appears on the face of the preliminary hearing transcript. Moreover, Crudgington suggests that nothing prohibits a superior court from specifying those collateral issue motions procedure even if the evidence in the transcript appears sufficient. Finally, we see nothing wrong with a procedure, like that which appears to be used in the San Diego Superior Court, requiring that all nonstatutory pretrial motions be heard by the assigned trial judge rather than the law and motion judge.

We need not speculate on the myriad of factual circumstances which might give rise to claims properly treated under a nonstatutory motion procedure. (See, e.g., Hurgia (cont.)

the People correctly point out that a defendant's guilty plea waives all defects unrelated "'to the legality of the proceedings' resulting in the plea." (People v. DeVaughn, supra, 18 Cal.3d at p. 895; see also People v. Lee (1980) 100 Cal.App.3d 715, 717.) They also note that the erroneous denial of a Penal Code section 995 motion is generally not appealable after a guilty plea.

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5 (cont.)
v. Municipal Court (1975) 15 Cal.3d 286, 293, fn. 4.) As we explain later (see post, fn. 12), we perceive strong policy reasons why factual issues collateral to the guilt or innocence of the accused are best resolved by the trial judge in a pretrial evidentiary hearing rather than risk confusing the task before the jury. Nevertheless, the apparent procedural holding of People v. Barraza (1979) 23 Cal.3d 675 is that an entrapment claim is exclusively a question for the jury to decide. (Id., at p. 691, fn. 6.) Since we conclude that claims of the type raised in this case are governed by California's objective entrapment standard (see post, p. 23), Auto Equity principles dictate that such claims not be resolved in a pretrial evidentiary hearing. (See Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal.2d 450, 455.)

People v. Lilienthal (1978) 22 Cal.3d 891, 897.)

In this case, however, the record strongly suggests that defendants entered into their guilty pleas on the assumption they would receive appellate review of their due process claim. Appeal of this issue was mentioned by both Mehlow and Ellington on their change of plea forms. In this context, the instant case is similar to People v. DeVaughn, supra, 18 Cal.3d 889 where the plea bargain included a provision that the court would issue certificates of probable cause. (See Pen. Code, section 1237.5) The DeVaughn court held that a guilty plea is improperly induced where a defendant is led to believe he may appeal on an issue which is in fact not cognizable after his plea. Under such circumstances, the case is normally remanded to the trial court to allow the defendant to withdraw

his plea if he so desires. Although defendants here did not explicitly condition their pleas on the ability to appeal, we view the notations on the change of plea forms as sufficient.[6] DeVaughn indicates that guilty pleas entered into under such circumstances are improperly induced.

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[6] We recognize that the pressures of the trial bench do not often allow for research and reflection on the numerous and unique legal problems which present themselves to the trial judge as a matter of course. Thus, where a defendant makes clear he intends to appeal an issue after he pleads guilty, it would be unreasonable to expect the judge to advise the defendant whether his specific claim will be cognizable on appeal; that is a job better to defendant's counsel. Nonetheless, since cognizability is often a key question on appeals following a guilty plea, we note that the problem of mistaken assumptions present in this case could be routinely avoided if the trial court simply informed the defendant that his guilty plea will be enforced regardless of whether he in fact receives appellate review of his claim.

Notwithstanding the foregoing discussion, we think there is a clear difference between cases in which the defendant is mistakenly led to believe he may appeal a meritorious claim, as in DeVaughn, supra, and cases in which the claim, even if reviewed on appeal, would not entitle the defendant to relief. If defendant bargained for appellate review of a contention, and if the reviewing court determines such contention to be without merit, defendant should not be given more than he bargained for. Under such circumstances, the conviction may properly be affirmed.[7] With this standard in mind, we proceed to address defendants' substantive argument.

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[7] We recognize that in a procedurally perfect system, the appellate court would merely determine whether the plea was improperly induced and, if so, remand to allow the defendant to withdraw his plea if he chose to do so. Considerations of judicial economy, however, require courts to be a bit more pragmatic (see People v. DeVaughn, supra, 18 Cal.3d at p. 897), which effectively results in appellate review of non-cognizable issues.

III

The substance of defendants' argument is that police misconduct in investigating crime may become sufficiently gross and outrageous as to preclude conviction of defendants for the crimes involved. Finding no California cases on point, defendants must rely on a series of federal cases to buttress their assertions.

We have reviewed the factual circumstances identified by defendants and conclude that none of the procedures employed by Officer Berstler constitutes significant misconduct. Moreover, defendants can offer no precedential or policy support for prohibiting the investigatory techniques utilized here. In addition, we explain why the legal basis for defendants' argument has little aplication in California which has adopted a purely objective standard for the defense of entrapment. Since the purpose of the

federal due process/outrageous conduct claim is the same as California's entrapment defense -- the deterrence of police misconduct -- we hypothesize that there will be few if any situations in which a due process violation would not also constitute entrapment.

A

The accusations of impropriety directed at Officer Berstler by defendants fall into three general categories. First, defendants point to Berstler's testimony that the one pound of marijuana sold to defendants was taken from a police evidence locker, purportedly in violation of the Health and Safety Code. They also note that Berstler permitted the use of a small amount of the drug in his presence. Second, they indicate that Berstler spoke with DeMasi on numerous occasions before DeMasi offered to commit a crime, presumably suggesting that defen-

dants were in some sense unwilling participants in the criminal enterprise. Finally, they argue that the nature of the transaction itself (sale by the police to the defendants followed by an immediate arrest for possession) constitutes police overinvolvment in the creation of a crime. This aggregation, defendants assert, amounts to police overreaching which constitutes "a denial of fundamental fairness, shocking to the universal sense of justice. . . ." (See Betts v. Brady (1942) 316 U.S. 455, 462.)

Relying on People v. Backus (1979) 23 Cal.3d 360, defendants assert that Berstler violated Health and Safety Code sections 11473 and 11473.5[8] (formerly sections 11474 and 11474.5) by utilizing narcotics seized

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[8] Section 11473 provides: "All seizures under provisions of this chapter, except seizures of vehicles, boats, or airplanes, shall, upon conviction of the owner or defendant, be ordered destroyed by the court in which conviction was had." (cont.)

in connection with other cases in connection with his investigatory activities in this case. Backus, however, is fundamentally inapposite. That case involved the prosecution of several police officers for various activities which included the provision of heroin to addict-informers in exchange for information. The officers had previously seized the heroin in conjunction with other

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8 (cont.)
Section 11473.5 states: "All seizures of controlled substances, instruments, or paraphernalia used for unlawfully using or administering a controlled substance which are in possession of any city, county, or state official as found property, or as the result of a case in which no trial was had or which has been disposed of by way of dismissal or otherwise than by way of conviction, shall be destroyed by order of the court, unless the court finds that the controlled substances, instruments, or paraphernalia were unlawfully possessed by the defendant."

investigations. The Backus court noted that sections 11473 and 11473.5 demonstrate a "legislative intent that controlled substances seized by peace officers not be dissipated or find their way back into the hands of persons not authorized to possess them. . . ." (Id, at p. 385.)

In contrast, the seized marijuana utilized by Berstler in this case was simply bait for a trap. Police procedures were orchestrated to insure there was no chance defendants would escape from the scene with the contraband. Since the purpose of the statutes is to regulate the "disposition of controlled substances seized by peace officers" (id, at p. 384; italics added), and since the marijuana here was never "disposed of,"[9] we do not view the statutes

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[9] One could of course argue that since Berstler allowed defendants to sample a minute quantity of the contraband, he improperly "disposed of" a controlled substance. Unless one is willing to conclude, however, that police should never engage in a "controlled (cont.)

as having been violated.[10]

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[9] (cont.)
sale" of narcotics, the destruction of a small amount incidental to the consumation of the transaction would not appear contrary to the Legislature's purpose in enacting the statutes. For prohibiting the undercover officer from allowing a potential buyer to sample the merchandise would, given the nature of the narcotics business, effectively preclude many such transactions.

[10] We note that a contrary holding would effectively preclude narcotics officers from entering into a controlled sale of drugs since the police, presumably, do not maintain sources of supply independent of previously seized evidence, In this context it is worthy of mention that the Backus court explicitly contemplated that legitimate law enforcement activities may involve the sale of contraband by police officers. (23 Cal.3d at p. 382.)

Defendants also suggest that Berstler's persistent contacts with DeMasi demonstrate police overreaching and encouragement.[11] In making this argument, however, they ignore Berstler's testimony that DeMasi instructed him to "keep getting back to him in order to purchase the cocaine." Given DeMasi's instruction, we see nothing wrong with Berstler's repeated contacts, let alone anything of magnitude which would entitle defendants as a matter of law to dismissal of the charges. Insofar as Berstler's contacts with defendant Mehlow are concerned, he only talked with Mehlow twice and he properly refrained from making any additional contacts after Mehlow informed him he had no cocaine to sell and asked that Berstler not call again.

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[11] In this regard it is significant defense counsel at oral argument contended that the number of contacts between DeMasi, Mehlow and Berstler was irrelevant in determining whether Berstler's actions amounted to outrageous police conduct violative of defendants' due process rights.

Finally, defendants focus on the nature of the narcotics transaction and argue that the police should not be permitted to sell contraband to a defendant and then immediately arrest him for possession of the drug. Relying on a truncated "but-for" causation analysis, they contend that Officer Berstler "created" the crime with which they are charged since he provided them with the marijuana they possessed.

Courts have for many years recognized that the commercial nature of most illegal drug transactions requires different types of law enforcement techniques; actual police participation in criminal enterprises, unnecessary in the investigation of most other types of crime, is often the only effective way to combat drug trafficking. (See, e.g., People v. Backus, supra, 23 Cal.3d at p. 382; People v. Wright, supra, 2 Cal.App.3d at p. 736; People v. Alvarado (1968) 258

Cal.App.2d 756, 760; see also Hampton v. United States (1976) 425 U.S. 484, 495-496, fn. 7 (conc. opn. of Powell, Jr.).) Many if not most drug-related arrests involve a police purchase of narcotics followed by the arrest of the seller for the sale. It is certainly true that but for the police purchase, the illegal transaction would not have occurred. Yet we do not view the police as having created the crime. Similarly here, Berstler's sale of the marijuana to willing buyers did not "create" the crime of possession.

We do not mean to suggest that the police should advertise themselves in the business of selling narcotics and promptly arrest anyone who accepts their offer to sell. But this case is markedly different. DeMasi initiated the transactions by asking to buy marijuana; Berstler merely responded that he thought he could obtain it. The

preliminary hearing transcript does not even remotely suggest that the transaction was involuntarily entered into by defendants.

Further support for our conclusion is found in cases dealing with the receipt of stolen property. Numerous cases have approved an investigatory technique where police offer property for sale, representing that it is stolen, when in fact it is not. After a sale is made, the defendant is arrested for attempting to receive stolen property. (See, e.g., People v. Rojas (1961) 55 Cal.2d 252; People v. Wright (1980) 105 Cal.App.3d 329; People v. Moss (1976) 55 Cal.App.3d 179; Lupo v. Superior Court (1973) 34 Cal.App.3d 657.) In these cases, as in the instant case, police provision of the contraband makes it possible for defendant to commit the charged crime. Nevertheless, courts routinely affirm such convictions without so much as a suggestion that

the police involvement constitutes outrageous conduct violative of due process guarantees.

B

In addition to being factually unsupportable, defendants' claim of outrageous police misconduct is legally flawed as well. Focusing as it does on police conduct occurring before commission of the crime, their argument overlaps the defense of entrapment in California.[12] (See People v. Barraza, supra, 23 Cal.3d 675.) Defendants, however, rely on a series of federal cases which have suggested that even where entrapment

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[12] The relationship between a due process claim and an entrapment defense also raises procedural questions as to when and under what circumstances such issues should be resolved. Defendants' argument that a Penal Code section 995 motion is a proper vehicle to raise the claim (see ante, p. 8) highlights the procedural question here.

Recognition of any type of official misconduct claim as providing grounds to impose a sanction on the prosecution has as its object the deterrence of objectively unreasonable official behavior. Misconduct, of course, may occur at virtually any stage of a criminal proceeding. When it happens (cont.)

is not shown, sufficiently gross police misconduct may constitute grounds for dismissal consistent with general due process

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[12](cont.)
before the commission of the crime, we view the defendant as having been "entrapped." (See People v. Barraza, supra, 23 Cal.3d 675.) Government misconduct in investigating a crime -- the post-commission pre-arrest stage -- most often gives rise to Fourth Amendment violations. (See generally Mapp v. Ohio (1961) 367 U.S. 643.) Post-arrest misconduct may run afoul of Fifth and Sixth Amendment guarantees. (See Miranda v. Arizona (1966) 384 U.S. 436; Barber v. Municipal Court (1979) 24 Cal.3d 742.) Although the substantive standard of reasonableness by which the official conduct is judged may differ depending on the stage of the proceeding, the relevant procedural considerations are arguably the same. In all cases, the issue involves not the defendant's conduct but rather the conduct of a law enforcement official. We thus suggest that such issues are best resolved prior to trial in a separate evidentiary hearing. (Cf. Murgia v. Municipal Court, supra, 15 Cal. 3d 286, 293, fn. 4.) While this appears to be the current practice as to Fourth, Fifth and Sixth Amendment violations (see Pen. Code, section 1538.5; People v. Superior Court (Zolnay) (1975) 15 Cal.3d 729, 734; Barber v. Municipal Court, supra, 24 Cal. 3d 742, 745), the Supreme Court has not seen fit to authorize a similar procedure in cases of entrapment. (See People v. Barraza, supra, 23 Cal.3d at p. 691, fn. 6; see also People v. Moran (1970) 1 Cal.3d (cont.)

principles.[13] (See, e.g., United States v. Twigg (3d Cir. 1978) 588 F.2d 373, 379;

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[12](cont.)
755, 765-766 (dis. opn. of Traynor, C.J.).) Since the substantive purpose of both the California entrapment defense and defendants' proffered "outrageous conduct" theory is the deterrence of unreasonable police conduct prior to a crime's commission, we can discern no principled reason to procedurally differentiate the two claims. (See post, p. 22-23.) Thus, until either the Supreme Court or the Legislature addresses the problem, such a claim remains a factual defense to be determined by the jury at trial. (Barraza, supra, at p. 691, fn. 6; see ante, fn. 5.)

[13] By analogy, defendants cite us to two California cases which have approved the pretrial dismissal of charges based on impermissible police or prosecutorial conduct. (Barber v. Municipal Court, supra, 24 Cal.3d 742; People v. Moore (1976) 57 Cal.App.3d 437.) Both cases, however, involve official interference with an attorney-client relationship after a defendant's arrest on criminal charges; in contrast, this case involves official misconduct before the crime was committed. In any case, we do not mean to suggest that it would not be preferable for all official misconduct issues to be resolved pretrial (see ante, fn. 12), only that the current structure of the entrapment defense precludes such a resolution. (See People v. Barraza, supra, 23 Cal.3d at p. 691, fn. 6.) Since this case, like Barraza and unlike Barber and (cont.)

United States v. West (3rd Cir. 1975) 511 F.2d 1083, 1085; United States v. Bueno (5th Cir. 1971) 447 F.2d 903, 905.)

Two facts should be noted. First, the circuit court cases which approve the "outrageous conduct" claim generally involve a "full circle" analysis. The "full circle" refers to situations where the government provides the defendant with both the ability and opportunity to commit the crime. This typically occurs where a government agent provides contraband to the defendant and then arranges for the defendant to sell it to other government agents. In effect, the defendant is merely a conduit through which the government sells drugs to itself. (See United States v. West, supra, 511 F.2d at p. 1085.)

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13 (cont.)
Moore, involves impermissible police conduct prior to a crime's commission, we view Barraza as enunciating both the correct substantive standard and applicable procedure.

In the instant case, we have only half a circle. The government has, at a defendant's request, provided him with contraband and then immediately arrested him for the crime which has taken place. The defendants have cited us to no case, federal or state, which even impliedly condemns this law enforcement technique, let alone dismisses charges on such a basis. Moreover, the U.S. Supreme Court's decision in Hampton v. United States, supra, 425 U.S. 484 casts considerable doubt on the viability of even the classic full-circle cases.[14] (See United States v. Twigg, supra, 588 F.2d at p. 379.)

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[14] Hampton itself is a full-circle case, at least based on defendant's version of the facts. Accepting that possibility, the three-justice plurality held that the defense of entrapment was the sole remedy for claims of outrageous police conduct. Defendant's predisposition, the plurality concluded, rendered that defense unavailable. The three dissenters would have found the due process defense applicable if defendant (cont.)

A second point invclves the different entrapment standards applicable in California

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14 (cont.)
could prove his full-circle factual predicate. Justices Powell and Blackmun, concurring separately, would not concede that entrapment was the only remedy under all circumstances. Justice Powell's opinion made clear, however, that a full-circle transaction does not in any sense automatically violate due process:

> "Petitioner, Charles Hampton, contends that the Government's supplying of contraband to one later prosecuted for trafficking in contraband constitutes a per se denial of due process. As I do not accept this proposition, I concur in the judgment of the Court and much of the plurality opinion directed specifically to Hampton's contention. . . . [¶] In United States v. Russell, 411 U.S. 423, 431 (1973), . . . [w]e. . . recognized that the practicalities of combating the narcotics traffic frequently require law enforcement officers legitimately to supply 'some item of value that the drug ring requires.' 411 U.S., at 432. Accordingly, we held that due process does not necessarily foreclose reliance on such investigative techniques. Hampton would distinguish Russell on the ground that here contraband itself was supplied by the Government, while the phenyl-2-propanone supplied in Russell was not contraband. (cont.)

and federal cases. Under the federal standard, entrapment is not a defense where the defendant has a demonstrated predisposition to commit the crime, regardless of the extent or unlawfulness of police action in creating the crime. (See United States v. Russell (1973) 411 U.S. 423.) The federal standard was explicitly rejected by the California Supreme Court in People v. Barraza, supra, which held that the purpose of the entrapment defense is to deter dubious and improper police conduct. (See 23 Cal.3d at pp. 686-691.) The court therefore concluded that the relevant focus was not on

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14 (cont.)
Given the characteristics of phenyl-2-propanone, this is a distinction without a difference and Russell disposes of this case." (425 U.S. at pp. 491-492; fn. omitted, italics added.)

Thus, the full-circle transaction was not "disapproved by. . . five justices in Hampton." (See dis. opn. post, at p. 19, fn. 9.)

the particular defendant's subjective mental state -- his predisposition toward criminal action -- but rather on whether the police acted in such a way as was "likely to induce a normally law-abiding person to commit the offense[.]" (Barraza, supra, at pp. 689-690.) It is thus certainly plausible to argue that the existence of a flexible due process claim based on outrageous police conduct is necessary at the federal level to protect against police misconduct which would form the basis for an entrapment defense in California under Barraza.

Notwithstanding the obvious overlap, there may well be cases where police misconduct as to third persons would not fit within an entrapment framework but nonetheless prevent a defendant's conviction on the grounds of fundamental fairness. (See, e.g., People v. Isaacson) (N.Y. 1978) 378 N.E.2d 78, cited in People v. McIntire (1979)

23 Cal.3d 742, 748, fn. 1.) But where the police actions relate solely to contacts with the defendants, as they do here, we view the Barraza standard as the constitutional and public policy statement on the issue.[15] As the court there noted, that

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[15] Although it is true that an outrageous conduct claim in federal courts has been held to present a question of law for the court to determine pretrial pursuant to Federal Rules of Criminal Procedure, rule 12(b) (see United States v. Graves (5th Cir. 1977) 556 F.2d 1319, 1322) and although we prefer this procedure (see ante, fns. 5 and 12), we do not think that a defendant's due process rights are violated if the objective reasonableness of the government action is left for the jury to decide. Moreover, even under the federal procedure a full-scale evidentiary hearing is required (see United States v. Batres-Santolino (N.D. Cal. 1981) 521 F.Supp. 744, 746) which is an opportunity defendants in this case waived. (See ante, at p. 8.)

standard is designed to balance protection for the defendant against the public's interest in and need for effective law enforcement. (Barraza, supra, 23 Cal.3d at p. 690.)

Applying Barraza to the facts of the instant case, the simple answer is that, as defendants willingly concede, a guilty plea waives any defense of entrapment. More importantly, however, given the bare factual record before us, it would be impossible for this court to hold as a matter of law that the police conduct in this case was such as to induce a normally law-abiding citizen to commit the crime. In fact, given DeMasi's unsolicited offer to buy the marijuana, it is difficult to conceive of any version of the facts which would support such a determination. And if defendants could not prove entrapment under California's liberal objective standards, it follows

almost necessarily that an outrageous conduct claim is unfounded since "the level of government misconduct that must be shown is perhaps higher than for entrapment. . . ." (United States v. Batres-Santolino, supra, 521 F.Supp. at p. 750; see dis. opn. post, at p. 6.

IV

In conclusion, while in a technical sense defendants were improperly induced to enter into their guilty pleas on the mistaken assumption that their due process/outrageous conduct claim was subject to appellate review, we have determined that even the appellate review defendants bargained for would afford them no relief. Restricted as we are to the evidentiary record contained in the preliminary hearing transcript, there is simply no factual, precedential or policy basis for upholding

charges of misconduct against Officer Berstler in this case. Moreover, the federal cases on which defendants rely to establish the legal basis for their claim are largely off point in a California system which accepts the objective "hypothetical person" standard for entrapment.

We accordingly conclude that defendants are properly bound by their guilty pleas.[16]

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[16] We admit to some discomfort with the ponderous nature and length of this decision. We suspect the parties may not recognize what they initially thought was a simple case. Defendants focused on the substance of their claim, the allegedly outrageous police conduct; the People argued we could not reach the issue because it was not cognizable on appeal. Unfortunately, when these "simple" issues were put together and independently examined by members of the panel (see 127 Cal.App.3d 452, rehg. granted Jan. 12, 1982), simplicity may have been lost in our collective effort to articulate our concerns on the interesting, complex and emotionally charged issues which are presented. If anything, this case clearly reveals the dynamic process in which courts engage, obtaining diverse views from cooperative and competent appellate counsel who willingly and graciously submitted supplemental briefs and reargued their positions (cont.)

Disposition

Judgment affirmed.

CERTIFIED FOR PUBLICATION.

/s/
WIENER, J.

I CONCUR:

/s/
COLOGNE, Acting P.J.

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16 (cont.)
while the members of the panel collegially studied to produce a written product which would fairly and completely express all our views. There can be no doubt but that we all believe the administration of justice is well-served if the only negative aspect to the thorough and demanding process we have described is the length of the opinions produced.

I respectfully dissent.

The admitted acts of Police Officer Berstler fomented, created and gave birth to every element of the crime of possession of marijuana for sale. Officer Berstler had tried for weeks to get these defendants to sell him cocaine; but his efforts proved unsuccessful. Not to be frustrated in his pursuit of crime, he then supplied, encouraged the use of, sold and delivered a pound of marijuana to these reluctant cocaine sellers to be. He then promptly arrested them for possession for sale of the very contraband he had only minutes before placed in their hands. No reported federal, state or California case sanctions this degree of police complicity in fomenting, encouraging and immediately causing the commission of a crime.

To reach this summit of ingenuity in the manufacture of crime statistics, the

police officer violated Health and Safety Code sections 11474 and 11474.5 (in effect in 1979 but amended in 1980) which mandated a specific disposition of all controlled substances seized by peace officers. Section 11474 directed "[a]ll seizures under provisions of this chapter shall, upon conviction of the owner or defendant, be ordered destroyed by the judge of the court in which conviction was had and the judge shall turn all such evidence over to the Attorney General for destruction or disposition." Health and Safety Code section 11474.5 provided for destruction of controlled substances seized pursuant to the same division when the case has been disposed of by way of dismissal or otherwise. The majority opinion is bereft of authority to support the police violations of law. No statute, case, or police procedure is cited authorizing Berstler to dispose of contraband by selling it to

anyone.[1]

In addition to obtaining marijuana without authority of law, Officer Berstler committed this further illegal act. To induce these reluctant, unwilling sellers of cocaine to become buyers of marijuana, he supplied them with samples of marijuana, furnished, permitted, encouraged and stood by and watched as they ingested -- smoked -- the illegal weed. A cloud of dry dust storms about in the judicial throat when

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[1] It is argued the Health & Safety sections do not apply in this case because "the marijuana here was never disposed of" and because "legitimate law enforcement activities may involve the sale of contraband by police officers." (Maj. opn. at p. 13.) The majority casually describes the marijuana as "simply bait for a trap" and intimates that unless the police were to, in the vernacular, "grow their own" a precise reading of the statute would preclude effective law enforcement. The statute says "all seizures" of controlled substances "shall be destroyed" according to court order. If this unambiguous statute does not mean what it says or if law enforcement cannot function within the law as written, the Legislature should change the law.

such multiple acts of illegality -- police creation of crime -- is euphemistically described as "effective law enforcement."[2]

DISCUSSION

I

The Attorney General's (and the majority opinion's) defense to these violations of

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[2]The trial judge's response should speak for itself: "Now, I have to say that I have been around these proceedings for a long time, and it's the first time that I can recall that I had an officer who actually encouraged a defendant or suspect to use illegal drugs in this way. I'm disturbed by the fact -- I'm frankly disturbed by the fact that Officer Berstler permitted them in his presence to consume, to ingest it. That act of permitting them to consume it or ingest it I think, is disturbing to me. I think that's going too far. I think it encourages -- it encouraged the use of an illegal drug, and it's disturbing to me. If the agent is only using marijuana, showing it to them or handing it to them to protect his cover as an undercover officer, that's another thing, but to actually permit its use, its ingestion into the system, I don't think that should be condoned.

"Whatever I rule in this case, I'm going to ask that the district attorney direct the police officers in such activities -- I think for an agent to actually encourage a suspect to consume a drug or to ingest it, I think, is going too far. . . ." (Italics added.)

law and public policy has been to argue that the appeal must be dismissed because the issue is not cognizable after the defendant's guilty plea.

Defendants do not tender an entrapment defense here. They concede entrapment is generally a factual issue, an affirmative defense to be raised before the trial court. (People v. Barraza, 23 Cal.3d 675, 791, fn. 6.) The issue tendered here is a constitutional one -- of due process -- fundamental fairness. Sufficiently gross police misconduct can conceivably lead to a finding that the conviction of the accused would violate his constitutional right to due process. (People v. McIntire, 23 Cal.3d 742, 748, fn. 1.)

Furthermore, the precise issue here -- "police misconduct violative of defendant's due process rights" -- was specifically raised by defendant's statutory Penal Code

section 995 motion. The section 995 motion was a proper and appropriate vehicle to challenge on constitutional basis, the sufficiency of the information/indictment. (People v. Pellegrino, 86 Cal.App.3d 776, 779; People v. Sahagun, 89 Cal.App.3d 1, 21.) In Murgia v. Municipal Court, 15 Cal. 3d 286, 293-294, footnote 4, the court stated:

> "[W]e believe the issue [discriminatory prosecution] should not be resolved upon evidence submitted at trial, but instead should be raised, as defendants have done here, through a pretrial motion to dismiss. Although no clear California statutory authority provides for such a pretrial motion to dismiss, we have no doubt in light of the constitutional nature of the issue as to the trial court's authority to entertain such a claim. (Accord Jones v. Superior Court (1970) 3 Cal.3d 734, 738-739. . .; People v. Coffey (1967) 67 Cal.2d 204, 215 and fn. 11. . . .)" (Italics added.)

See also People v. McIntire, supra, 23 Cal. 3d 742, 748, fn. 1.

The trial court did in fact deny defendant's Penal Code section 995 motion (mistakenly calling it a nonstatutory motion),

reasoning a decision to dismiss "because of serious police misconduct" was not its "decision to make. That has to be made at the trial court level. . . ." Thus the trial court did in fact rule on defendant's motion involving the precise issues raised here.

II

The "outrageous government conduct" defense comes forth in dictum in United States v. Russell, 411 U.S. 423, 431-432 [93 S.Ct. 1637]:

> "[W]e may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction. . . ."

The Supreme Court reaffirmed Sherman v. United States, 356 U.S. 369 [78 S.Ct. 819], finding excessive police conduct was as constitutionally offensive as coerced confessions and unlawful searches. The

Ninth Circuit Court of Appeals adopted a form of outrageous conduct defense two years before Russell. (Greene v. United States (9th Cir. 1971) 454 F.2d 785. The defense continues to be applicable in the Ninth Circuit even after the plurality decision in Hampton v. United States, 425 U.S. 484 [96 S.Ct. 1646].[3]

The defense is different from that of entrapment. Where entrapment is a question of fact, this defense presents a question of law. (United States v. McQuin (9th Cir. 1980) 612 F.2d 1193, 1196, cert. denied, 445 U.S. 955 [100 S.Ct. 1608].) Another significant difference under federal law is that it is available even to a defendant

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[3] See, United States v. Prairie (9th Cir. 1978) 572 F.2d 1316, 1319 & fn. 3: "Despite the lack of a majority opinion. . . [and] [r]egardless of how the plurality opinion in Hampton is read, a majority of the Court expressly refused to rule that due process principles could not prevent conviction. . . where. . . the government's conduct is sufficiently offensive."

who was "predisposed" to commit the crime. (See United States v. Wylie (9th Cir. 1973) 625 F.2d 1371, 1377.) Correspondingly, the level of government misconduct which will preclude conviction may be higher for successful assertion of this defense than for entrapment.

Secondly, federal constitutional principles embedded in the due process clause form the foundation of this defense. The defense of outrageous government conduct is not a jury question, it must be decided by the trial court. Again, in Russell, supra, at pages 431-432, the Supreme Court held the defense could arise if "the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction . . . ." (Italics added.) According to the Supreme Court as reaffirmed by five

members of that court in Hampton (Powell & Blackmun, JJ., concurring in judgment and Brennan, Stewart & Marshall, J.J., dissenting), the defense is based on "defects in the institution of the prosecution" itself. (Fed.R.Crim.P. 12(b)(1).) Therefore, this defense is properly decided by the trial court. (See United States v. Szycher (10th Cir. 1978) 585 F.2d 443, 445; United States v. Prairie, supra, 572 F.2d 1316, 1319; United States v. Graves (5th Cir. 1977) 556 F.2d 1319, 1321-23, cert. denied, 435 U.S. 923 [98 S.Ct. 1485]; United States v. Quinn (8th Cir. 1976) 543 F.2d 640, 648; United States v. Nunez-Rios (2d Cir. 1980) 622 F.2d 1093, 1098).

III

The United States Supreme Court has not as yet reversed a conviction because the nature and extent of police involvement was so overreaching that reversal was re-

quired as a matter of due process of law. The cases considered by the United States Supreme Court, as well as the "full circle" cases discussed infra, have not involved the degree of police misconduct involved here. However, the Supreme Court has explicitly left an "outrageous conduct" denial of due process defense open in United States v. Russell, supra, 411 U.S. 423, 431-432, but held on the facts:

> "[T]he instant case is distinctly not of that breed. [The agent's] contribution of propanone to the criminal enterprise already in process was scarcely objectionable. . . . The law enforcement conduct here stops far short of violating that fundamental fairness, shocking to the universal sense of justice, mandated by the Due Process Clause of the Fifth Amendment. [Citation.]" (Italics added.)

The Supreme Court reviewed the facts and determined the defense was not applicable under the circumstances. The police conduct in Russell consisted of an undercover federal narcotics agent's involvement with a metham-

phetamine laboratory already in operation at the time of the agent's participation. The agent supplied the defendants with a bottle of a chemical necessary for manufacture, and the extent of his participation in the manufacturing processes was that he once picked up some foil from the floor of the laboratory.

The United States Supreme Court again considered the defense in Hampton v. United States, supra, 425 U.S. 484. In this case the government agent instigated the sale and supplied the contraband which Hampton sold to undercover agents. The plurality opinion held, even though there was more police involvement in Hampton than in Russell, the police conduct was not a denial of due process because Hampton was predisposed to sell the contraband. The three dissenting justices found the police involvement in Hampton was sufficiently outrageous to

preclude conviction on the basis of fundamental fairness. Five justices, Powell, Blackmun, Brennan, Stewart, and Marshall, disagreed with the plurality's conclusion that the defendant's predisposition would operate as a bar to an assertion of the fundamental fairness defense.

The majority opinion in the instant case correctly notes the nature of the issues involves the conduct of the police, not the conduct of the defendant. (Maj. opn. pp. 18-19, fn. 12.) People v. Barraza, supra, compels this profound and decisive concession. The majority opinion implies Hampton merges the federal defense of entrapment with a claim of a denial of due process for police overinvolvement in the crime, and therefore, there is no little viability to this defense in federal law. (Maj. opn. pp. 21-22 & fn. 14.) This conclusion is wrong. It flies in the face of Hampton

and a multitude of later federal cases. The issue in Hampton was whether the defendant's predisposition to commit the crime defeated a defense based on outrageous police conduct. Justice Rehnquist's opinion (with two votes) held predisposition would defeat a due process defense. Even though there is strong language in the Rehnquist opinion, five justices refuse to agree the death knell has sounded for this due process defense. (See Hampton, supra, conc. opn. of Powell, J. at pp. 792-795; and dis. opn. of Brennan, J. at pp. 496-497.) Hampton should not be read too broadly because the Rehnquist opinion is focused upon the defendant's conduct. The concurring and dissenting opinions make it clear the focus should be on the conduct of the police because the foundation for the outrageous conduct defense rests in public policy and the court's supervisory powers. (See Sherman

v. United States, 356 U.S. 369 [78 S.Ct. 819], conc. opn. by Frankfurter, J.; United States v. Russell, supra, 411 U.S. 423, dis. opns. by Douglas & Stewart, JJ.; Hampton v. United States, supra, 425 U.S. 484, dis. opn. by Brennan, J.)

Several recent federal opinions are in accord with this interpretation: "In Hampton. . . a majority of the Justices agreed that in certain circumstances, the government's conduct may be so outrageous as to violate due process." (United States v. Tobias (5th Cir. 1981) 662 F.2d 381, 386; see also United States v. Jannotti (E.D. Pa. 1980) 501 F.Supp. 1182, 1189.)

Numerous federal cases after Hampton hold it is a denial of due process to be convicted of a crime when police overinvolvement in the commission of the crime is "outrageous.' (See United States v. Twigg (3d Cir. 1978) 588 F.2d 373, 379; United States

v. Prairie, supra, 572 F.2d 1316, 1319; United States v. Johnson (1st Cir. 1977) 565 F.2d 179, 181; United States v. Nunez-Rios, supra, 622 F.2d 1093, 1098; United States v. Hammond (5th Cir. 1979) 598 F.2d 1008, 1015; United States v. Till (5th Cir. 1980) 609 F.2d 228, 229; United States v. Tobias, supra, 662 F.2d 381, 386-387.)

In United States v. Twigg, supra, 588 F.2d 373, the court held police conduct could be so overreaching as to deny defendants due process. Defendants were convicted of manufacturing methamphetamine hydrochloride ("speed") and several drug related offenses. Police were responsible for renting a farmhouse to be used as the laboratory and providing glassware and a chemical ordinarily difficult to obtain but essential to manufacture speed. The court stated the rule for a due process challenge:

"Although proof of predisposition to commit the crime will bar application of the entrapment defense, fundamental fairness will not permit any defendant to be convicted of a crime in which police conduct was 'outrageous.' [Citations.]" (Id., at pp. 378-379.)

In United States v. Jannotti, supra, 501 F.Supp. 1182, the district court set a jury verdict aside and issued judgment of acquittal. One of several alternative grounds for acquittal was "governmental overreaching amounting to a violation of due process of law." (Id., at p. 1205.) Defendants had been convicted of various crimes including bribery and conspiracy based on evidence gathered in the government's undercover "Abscam" operation.[4] The

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[4] The operation was described by the court in general terms. "While the details of the ruse varied from time to time, as the result of improvisation by various undercover agents, the broad outlines of the scheme remained fairly constant: The undercover agents represented one or more extremely wealthy Arab sheiks desirous of investing huge cash resources in this country. Arrangements were made with the Chase Manhattan Bank, so that anyone who inquired (cont.)

court concluded with the statement:

> "No one who has viewed the videotape evidence in this case could avoid feelings of distress and disgust at the crass behavior the tapes reveal. The jury's verdict represents a natural human reaction to that evidence. But, in the long run, the rights of all citizens not to be led into criminal activity by governmental overreaching will remain secure only so long as the courts stand ready to vindicate those rights in every case." (Ibid.)

A motion to dismiss an indictment brought on due process grounds for outrageous govern-

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[4] (cont.)
would receive verification that the Arabs did indeed have more than $400 million on deposit with that institution. Mr. Weinberg would 'spread the word' through his underworld contacts and other shady connections. It was contemplated that persons expressing interest in providing investment opportunities would be carefully screened; if the proposed deal appeared legitimate, no further action would be taken, but if there was reason to suppose it might provide an opportunity for discovering criminality, the matter would be pursued, and the participants videotaped or otherwise electronically recorded. In actual practice, however. . . the distinction was not always carefully observed." (Id., at p. 1193.)

mental involvement was granted in United States v. Batres-Santolino (N.D. Cal. 1981) 521 F.Supp. 744. Defendants were indicted for conspiracy to import cocaine and conspiracy to possess cocaine with an intent to distribute it. A government agent met the defendants at the home of a friend and they discussed cocaine. The agent suggested he had a source and offered to supply a substantial quantity of cocaine to the defendants. It took several months to consumate the deal although there were several contacts to discuss price and quantity. The agent told defendants that if the cocaine transaction was successful, future legitimate business transactions could be accomplished. An agreement was finally reached and defendants were arrested while making arrangements to pick up the cocaine shipment. The court said:

"This is a case of that distinguishable variety posed in Sherman and Russell where the 'criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute.' Sherman v. United States, 356 U.S. at 372, 78 S.Ct. at 820, quoting Sorrells v. United States, 287 U.S. at 442, 53 S.Ct. at 212. Although the defendants in this case are not without some culpability, they were not embarked or about to embark on any criminal activity until the government's agents set in motion the operation." (Id., at p. 752.)

If the principles set out in Sorrells, Sherman, and Russell and cautiously preserved in Hampton have any application, there must be a level of governmental misconduct which triggers operation of this defense. The courts in Twigg, Jannotti, and Batres-Santolino, found this level had been reached.

In a most recent case of United States v. Tobias, supra, 662 F.2d 381, government agents had delivered chemicals to Tobias' house and gave him "step by step advice"

on how to manufacture the drug PCP. Tobias proceeded to manufacture the illegal drug in large quantities. The appeals court said (at p. 386):

> "The law enforcement conduct here stops far short of violating that 'fundamental fairness, shocking to the universal sense of justice,' mandated by the due process clause of the fifth amendment [citing Russell, supra]."

but cautioned (at p. 387):

> "We are mindful of the Supreme Court's admonition that due process can only be invoked in the rarest and most outrageous circumstances. Yet, this case does set the outer limits to which the government may go in the quest to ferret out and prosecute crimes in this circuit." (Italics added.)

IV

The focus, in California law, is "how much and what manner of persuasion, pressure, and cajoling are brought to bear by law enforcement officials to induce persons to commit crimes." (People v. Barraza, supra, 23 Cal.3d 675, 688.) Thus in California at the heart of both the entrapment defense

and the fundamental fairness defense is the conduct of the police officer because the court refuses to countenance dubious police conduct.[5] (Ibid.) Although Barraza

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[5] An objective approach similar to California's position focusing solely on the quality of the police conduct has been consistently supported by a weighty minority of United States Supreme Court justices. See Hampton v. United States, supra, 425 U.S. 484, 495-497 (Brennan, J., with Stewart & Marshall, JJ., dissenting); United States v. Russell, supra, 411 U.S. 423, 440-446 (Stewart, J., with Brennan & Marshall, JJ., dissenting); Sherman v. United States, supra, 356 U.S. 369, 382-385 (Frankfurter, J., with Douglas, Harlan, & Brennan, JJ., concurring in result); Sorrells v. United States, supra, 287 U.S. 435, 458-459 (Roberts, J., with Brandeis & Stone, JJ., concurring in part and dissenting in part).

See also New York v. Isaacson, 44 N.Y.2d 511, 378 N.F.2d 78: "Research indicates that the subjective test is [still] in use in the majority of the state jurisdictions; however, a number of them have adopted the objective test. As noted by R. Rossum, in the Entrapment Defense and the Supreme Court, 7 Memphis St.L.Rev. 367, 386-386 (1977), the academic community has overwhelmingly endorsed the objective test. Out of twenty-five law review articles written on the subject since 1950, only two have favored the subjective test. Moreover, this is the test adopted by the Model Penal Code, Section 2.13 (1962) and by the proposed Federal Criminal Code (1971)."

is an entrapment case the purpose of the entrapment test is precisely the same as the defense raised in this case: "[I]t is designed primarily to deter impermissible police conduct. . . ." (Id., at p. 691, fn. 5.)

As the federal cases point out, police conduct which constitutes "outrageous involvement" is a question of degree.[6] Few California cases discuss the limits of acceptable police conduct. One case which does is People v. McIntire, supra, 23 Cal.3d 742, issued at the same time the Supreme Court announced the Barraza decision.

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[6] Whether conduct is outrageous is a matter of degree and relativity. The cases have discussed the severity of the criminal activity in comparison to the extent of police involvement. The Twigg court noted: "We are adhering to Justice Powell's reasoning [in Hampton v. United States, supra, 425 U.S. 484, at pp. 495-496, fn. 7] that in evaluating whether government conduct is outrageous, the court must consider the nature of the crime and the tools available to law enforcement agencies to combat it." (Twigg, supra, 588 F.2d at p. 378, fn. 6.)

McIntire states: "Sufficiently gross police misconduct could conceivably lead to a finding that conviction of the accused would violate his constitutional right to due process of law." (Id., at p. 748, fn. 1) McIntire cites People v. Isaacson, 44 N.Y.2d 511, 378 N.E.2d 78, as an example of "sufficiently gross police conduct" to trigger the due process clauses of the state and federal constitutions.

In Isaacson, a third party, as a result of police brutalization and trickery, formed the misconception that he was facing a stiff prison sentence and so became an informant. At the behest of the police, he proceeded to contract various individuals, including Isaacson, a Pennsylvania resident with no prior record, who, although initially unwilling, following persistent solicitation finally agreed to sell the informant drugs in a quantity requested by the police.

Isaacson was lured by trickery into New York where the sale was made in accordance with specifications detailed by the police. The New York Court of Appeal held Isaacson was denied due process even though the defense of entrapment would be defeated by defendant's predisposition to commit the crime.[7]

The New York court set forth four "illustrative" factors to be considered in determining whether due process principles had been transgressed:

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[7] The same result would be obtained in California. Since People v. Barraza does not preclude the defense of entrapment even where there may be a "criminal disposition," a defense based on outrageous police over-involvement would not be precluded by disposition in California. The simple fact that Demasi initiated the marijuana transaction will not preclude a finding that the police involvement in the entire scheme was outrageous.

"(1) whether the police manufactured a crime which otherwise would not likely have occurred, or merely involved themselves in an ongoing criminal activity [citations]; (2) whether the police themselves engaged in criminal or improper conduct repugnant to a sense of justice [citations]; (3) whether the defendant's reluctance to commit the crime is overcome by appeals to humanitarian instincts such as sympathy or past friendship, by temptation of exorbitant gain, or by persistent solicitation in the face of unwillingness [citation]; and (4) whether the record reveals simply a desire to obtain a conviction with no reading that the police motive is to prevent further crime or protect the populace. . . ." People v. Isaacson, supra, 378 N.E.2d at p. 83.)

In United States v. West (3d Cir. 1975) 511 F.2d 1083, 1085, the court said:

"But when the government's own agent has set the accused up in illicit activity by supplying him with narcotics and then introducing him to another government agent as a prospective buyer, the role of government has passed the point of toleration. Moreover, such conduct does not facilitate discovery or suppression of ongoing illicit traffic in drugs. It serves no justifying social objective. Rather, it puts the law enforcement authorities in the position of creating new crime for the sake of bringing charges against a person they had persuaded to participate

in wrongdoing."[8]

If we test the totality of circumstances in this case against the factors important in both the federal and California approved Isaacson analysis, we find the police actually manufactured and created this crime. Berstler continually attempted to induce these defendants to sell cocaine. He was rebuffed up and until he agreed to sell marijuana to them. Berstler violated the laws of California by taking contraband -- required by law to be disposed of in a particular fashion -- to sell to defendants. He supplied marijuana for the use

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[8] In Greene v. United States, supra, 454 F.2d 783, 787: "[W]hen the Government permits itself to become enmeshed in criminal activity, from beginning to end, to the extent which appears here [supplying materials, location and operator of a still], the same underlying objections which render entrapment repugnant to American criminal justice are operative." (See also United States v. Twigg, supra; United States v. Tobias, supra.)

of the defendants and stood by while they smoked it. He then literally created the crime of possesssion of marijuana by placing one pound of it in their hands. This crime would not have occurred without the conceded encouragement and action of the police.

Even assuming every other police tactic used in this case could be justified as legitimate law enforcement technique, the final transaction cannot be condoned. Officer Berstler no sooner put the marijuana in the defendant's hands when he arrested him for possession of that same marijuana for sale. According to the majority opinion "[p]olice procedures were orchestrated to insure there was no chance defendants would escape from the scene with the contraband" and the contraband was not "disposed of." In fact, and in law this marijuana never left the actual or constructive possession of the police officer.

The facts of this case demonstrate more than just a "full-circle" transaction. In the classic "full-circle" transaction, the government agent supplies the contraband to the defendant. The defendant then of his own volition engages in a separate independent criminal act by selling the government contraband to another government agent. Thus in the "outrageous full- circle" transaction, the defendant engages of his own free will in the criminal act -- he sells the contraband to the government agent.[9] The full circle here, if we may call this a direct interface, a "full" circle, has no volitional act, no act of free will or choice separating the government's action

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[9] A "full-circle" transaction is where "the Government is doing nothing less than buying contraband from itself through an intermediary and jailing the intermediary." (Hampton v. United States, supra, at p. 498.) This specie of police misconduct has been uniformly disapproved by the federal judges including the five justices in Hampton. (See United States v. Till, supra, 609 F.2d 228, 230.)

creating the crime and the arrest for the crime so created. When Berstler handed the contraband to the defendants, the crime was completed. A more direct participation in the actual creating and committing of a crime is difficult to imagine.

The majority mischaracterizes the instant transaction as "only half a circle." If this is the case the majority have created a short-cut for police activity uniformly condemned if accomplished step by step. In this case the marijuana never left police possession. (Maj. opn. at p. 13.) The defendant was arrested on the spot for possession for sale to hypothetical buyers of marijuana he did not own.

The majority flirtation with the "attempted receiving" cases involving receipt of non-stolen property utterly fails for lack of either factual or legal base for comparison. Cases following People v. Rojas,

55 Cal.2d 252, are not on the same legal track as People v. Barraza, supra, or People v. McIntire, supra. Rojas turns upon the nature of the intent requirement to receive property that had lost its "stolen status." The most recent chapter in the philosophical discussion of the nature of the intent to commit a non-possible crime requirement is found in People v. Wright, 105 Cal.App. 3d 329, 333, where a strong dissent to the entire archaic reasoning process is expressed.

Of further concern here are the illegal actions by police which are repugnant to a sense of justice. While physical police brutality in the Rochin sense (Rochin v. People of California, 342 U.S. 165 [72 S.Ct. 205]) is not present, the persistent solicitation of wrongdoing, the disregard for, and wholesale breaking of the law leads to the conclusion that any means were justified to an end that contraband be placed

in the defendant's hand.[10]

Due process is a flexible doctrine, yet these police actions manifest a disregard for cherished principles of law and order. When we inquire whether due process principles have been transgressed in a particular factual frame there is no precise line of

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[10] "Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means -- to declare that the government may commit crimes in order to secure the conviction of a private criminal -- would bring terrible retribution. Against that pericious doctrine this could should resolutely set its face." (Justice Brandeis in Olmstead v. United States, 227 U.S. 438, 485 [48 S.Ct. 564, 575], in which Justices Holmes and Stone joined.)

demarcation or calibrated measuring rod which offers a mathematically accurate solution. Each instance in which a denial of due process is asserted requires independent testing in the light of fundamental and necessarily general but pliant premises.

In this case, there is nothing in the record from which to conclude this crime would have occurred absent Berstler's conduct. Berstler himself engaged in conduct not only of questionable legality but grossly repugnant to a sense of justice. The record reveals a persistent desire to obtain a conviction regardless of whether the tactics will prevent crime or protect the public.

In the final analysis whether conduct is so outrageous as to violate due process is a question of degree to be answered by sound judgment, but "there comes a time when enough is more than enough -- it is just too much." (Williamson v. United States

(5th Cir. 1962) 311 F.2d 441, 445 [Brown, J., concurring].) And "[a]s Chief Justice Warren observed, the function of law enforcement manifestly 'does not include the manufacturing of crime' [citing Sherman v. United States, supra]." (People v. Barraza, supra, 23 Cal.3d 675, 688.)

CERTIFIED FOR PUBLICATION.

/s/
STANIFORTH, J.

CERTIFIED FOR PUBLICATION

COURT OF APPEAL

FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,	)	FILED
	)	JUNE 8, 1982
Plaintiff and Respondent,	)	
	)	
v.	)	
	)	
PATRICK MARK DEMASI, et al.,	)	4 CRIM No. 11661
	)	(Super. Ct. No.
Defendant and Appellant.	)	CR 46830
	)	

THE COURT:

1. The last paragraph on page 2, continuing to page 3, is modified to read as follows:

On February 21, 1979, Berstler received information from a confidential informant that DeMasi and Mehlow were trafficking cocaine in San Diego. Shortly thereafter, Berstler was introduced to DeMasi and Mehlow.

2. The first sentence of the first full paragraph on page 3 is modified to read as follows:

EXHIBIT "B"

After the introduction, Berstler began an attempt to induce the defendants to sell him a quantity of cocaine.

/s/
Acting Presiding Justice

cc: All Parties

ORDER DENYING HEARING

AFTER JUDGMENT BY

THE COURT OF APPEAL

4th DISTRICT, DIVISION 1

CRIM. NO. 11661

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

IN BANK

PEOPLE

V.

PATRICK MARK DeMASI, et al.

FILED
AUG. 4, 1982

Appellants' petition for hearing is DENIED.

Broussard, J., is of the opinion that the petition should be granted.

The Reporter of Decisions is directed not to publish in the Official Reports the opinion in the above entitled cause filed May 24, 1982 and appears at 132 Cal.App.3d

EXHIBIT "C"

89. (Cal. Const., Art., VI, section 14; Rule 976, Cal. Rules of Court.)

Bird
Chief Justice